Appendix "A"

Notice of Appeal to the Supreme Court of the United States from the Supreme Court of the State of Michigan.

(Filed in the Recorder's Court of the City of Detroit Dec. 17, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan denying their petition for reconsideration of the denial of their application for leave to appeal, entered on October 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellants were convicted of the crime of conspiring to cheat and defraud, and conspiracy to obtain property by false pretenses, gross cheat and fraud, and obtaining property by false pretenses; appellant Morrison T. Wade was sentenced to four to ten years imprisonment; and appellant Bessie Lou Tanner Wade was sentenced to five years probation and to pay a fine of $3,000 and costs of $2,000; and the judgment as to appellant Bessie Lou Tanner Wade was stayed; and appellant Morrison T. Wade is presently released on bail in the sum of $5,000, both as ordered on November 1, 1954, by Justice Stanley Reed, Associate Justice, United States Supreme Court.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Hearing on Motion for New Trial, and attached Motion for New Trial and Supplement to Motion for New Trial.

2. Opinion of Judge Breakey, Circuit Judge Acting as Recorder's Court Judge, dated March 12, 1953.

3. Application for Leave to Appeal.

4. Brief in Support of Defendants' Application for Leave to Appeal.

III. The following questions are presented by this appeal:

1.

The so-called one-man grand jury law of the State of Michigan (being Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan of 1917, as amended by Act 395 of the Public Acts of 1921, being sections 28.943 and 28.944, Michigan Statutes Annotated, and being Sections 3 and 4, Chapter VII of Chapter 287 of the Code of Criminal Procedure of the State of Michigan) is repugnant to Section 1, Article XIV. of the Amendments to the Constitution of the United States, and therefore is unconstitutional.

2.

The so-called one man grand jury law of the State of Michigan, supra, is unconstitutional in that it is repugnant to Section 4 of Article IV. of the Constitution of the United States.

3.

Defendants were denied the equal protection of the laws and were deprived of their liberty and property without due process of the law, in violation of Section 1, Article XIV. of the Amendments to the Constitution of the United States, by reason of the following substantial errors:

(1) A false swearing on the part of a juror on the voir dire in order to get on the jury, that she was not acquainted with any member of the metropolitan police force of Detroit; whereas, as a matter of fact she was a next door neighbor for many years and a very good friend of a Detroit police officer who was an attache in the courtroom of Judge Arthur E. Gordon of the Recorder's Court of the

City of Detroit, which fact counsel for defendants had no way of anticipating and which was not disclosed until after the verdict of the jury was rendered. (Defendants had challenged for cause every prospective juror who indicated any acquaintance or friendship with any member of the metropolitan Police Department of Detroit because of defendants' claim that the proceedings against them were instigated by Kennedy Lawrence, Deputy Superintendent of the Police Department of Detroit, who, defendants claimed had threatened "to get Morrison T. Wade".)

(2) The list of jurors' names from which the jurors were chosen in the case in the Recorder's Court, was limited alphabetically from A to H, the names of the jury panel having been divided alphabetically into three boxes, so that defendants were deprived of their right to have a jury picked from the entire panel, which facts were not known to defendants or their counsel until after the trial of the cause had been concluded. The name of the juror, above referred to, who had sworn falsely on the voir dire, began with the letter "E".

(3) The record shows there was a tampering on the part of the Detroit Police Department with the jury during the trial of the cause, which tampering was not investigated as promised by the Trial Court, as a result of which defendants were lulled into a false sense of security and did not demand a mistrial, to which they were entitled.

(4) While defendants were charged with cheating and defrauding the citizens of Detroit by means of alleged misrepresentations and conspiracy so to do, the theory of the prosecution in the trial of the case was based upon embezzlement, and the charge of the Court was likewise based upon embezzlement, by reason of which there was a fatal variance and defendants suffered irreparable injury there-

by, and if the verdict and sentence are permitted to stand, they will result in a gross miscarriage of justice.

LARRY S. DAVIDOW,
Attorney for Morrison T. Wade
and Bessie Lou Tanner Wade

3210 Book Tower
Detroit 26, Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney for Morrison T. Wade and Bessie Lou Tanner Wade, defendants and appellants herein, and that on the 17th day of December, 1954, he served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

Deponent further says that on December 17, 1954, he filed a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, in the Recorder's Court for the City of Detroit, by depositing a copy thereof with the Clerk of the Recorder's Court for the City of Detroit, County of Wayne, State of Michigan.

Subscribed and sworn to before me this 17th day of December, A.D., 1954,

NELL M. YORGEN,
Notary Public, Wayne County, Michigan

My commission expires November 11, 1957.

Appendix "B"

Amended Notice of Appeal to the Supreme Court of the United States from the Supreme Court of the State of Michigan.

(Filed in the Recorder's Court of the City of Detroit Dec. 28, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

LARRY S. DAVIDOW, being duly sworn, deposes and says that he is the attorney for Morrison T. Wade and Bessie Lou Tanner Wade, defendants and appellants herein, and that on the 17th day of December, 1954, he served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

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NELL M. YORGEN,
Notary Public, Wayne County, Michigan

My commission expires November 11, 1957.

Appendix "B"

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(Filed in the Recorder's Court of the City of Detroit Dec. 28, 1954)

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs -vs- **MORRISON T. WADE and BESSIE LOU TANNER WADE,** Defendants	**No. A-51843**

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Morrison T. Wade and Bessie Lou Tanner Wade, the defendants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Michigan

denying their petition for reconsideration of the denial of their application for leave to appeal entered on October 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellants were convicted of the crime of conspiring to cheat and defraud, and conspiracy to obtain property by false pretenses, gross cheat and fraud, and obtaining property by false pretenses; appellant Morrison T. Wade was sentenced to four to ten years imprisonment; and appellant Bessie Lou Tanner Wade was sentenced to five years probation and to pay a fine of $3,000 and costs of $2,000; and the judgment as to appellant Bessie Lou Tanner Wade was stayed; and appellant Morrison T. Wade is presently released on bail in the sum of $5,000, both as ordered on November 1, 1954, by Justice Stanley Reed, Associate Justice, United States Supreme Court.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Hearing on Motion for New Trial, and attached Motion for New Trial and Supplement to Motion for New Trial.

2. Opinion of Judge Breakey, Circuit Judge Acting as Recorder's Court Judge, dated March 12, 1953.

3. Application for Leave to Appeal.

4. Order of the Supreme Court of Michigan denying the Application for Leave to Appeal.

III. The following questions are presented by this appeal:

1.

The so-called one-man grand jury law of the State of Michigan (being Sections 1 and 2 of Act 196 of the Public Acts of the State of Michigan of 1917, as amended by Act 395 of the Public Acts of 1921, being Sections 28.943 and 28.944, Michigan Statutes Annotated, and being Sections 3 and 4, Chapter VII of Chapter 287 of the Code of Criminal Procedure of the State of Michigan) is repugnant to Section 1, Article XIV. of the Amendments to the Constitution of the United States, and therefore is unconstitutional.

2.

The so-called one-man grand jury law of the State of Michigan, supra, is unconstitutional in that it is repugnant to Section 4 of Article IV. of the Constitution of the United States.

3.

Defendants were denied the equal protection of the laws and were deprived of their liberty and property without due process of the law, in violation of Section 1, Article XIV. of the Amendments to the Constitution of the United States, by reason of the following substantial errors:

(1) A false swearing on the part of a juror on the voir dire in order to get on the jury, that she was not acquainted with any member of the metropolitan police force of Detroit; whereas, as a matter of fact she was a next door

neighbor for many years and a very good friend of a Detroit police officer who was an attache in the courtroom of Judge Arthur E. Gordon of the Recorder's Court of the City of Detroit, which fact counsel for defendants had no way of anticipating and which was not disclosed until after the verdict of the jury was rendered. (Defendants had challenged for cause every prospective juror who indicated any acquaintance or friendship with any member of the metropolitan Police Department of Detroit because of defendants' claim that the proceedings against them were instigated by Kennedy Lawrence, Deputy Superintendent of the Police Department of Detroit, who, defendants claimed had threatened "to get Morrison T. Wade").

(2) The list of jurors' names from which the jurors were chosen in the case in the Recorder's Court, was limited alphabetically from A to H, the names of the jury panel having been divided alphabetically into three boxes, so that defendants were deprived of their right to have a jury picked from the entire panel, which facts were not known to defendants or their counsel until after the trial of the cause had been concluded. The name of the juror, above referred to, who had sworn falsely on the voir dire, began with the letter "E".

(3) The record shows there was a tampering on the part of the Detroit Police Department with the jury during the trial of the cause, which tampering was not investigated as promised by the Trial Court, as a result of which defendants were lulled into a false sense of security and did not demand a mistrial, to which they were entitled.

(4) While defendants were charged with cheating and defrauding the citizens of Detroit by means of alleged misrepresentations and conspiracy so to do, the theory of the prosecution in the trial of the case was based upon em-

bezzlement, and the charge of the Court was likewise based upon embezzlement, by reason of which there was a fatal variance and defendants suffered irreparable injury thereby, and if the verdict and sentence are permitted to stand, they will result in a gross miscarriage of justice.

LARRY S. DAVIDOW,
Attorney for Morrison T. Wade
and Bessie Lou Tanner Wade

3210 Book Tower
Detroit 26, Michigan

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

JAMES RENFREW, being duly sworn, deposes and says that on the 28th day of December, 1954, he served a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States, upon Edmund E. Shepherd, Solicitor General of the State of Michigan, by mailing a copy of the same addressed to him at the office of the Attorney General, Lansing, Michigan.

Deponent further says that on December 28, 1954, he filed a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States, in the Recorder's Court for the City of Detroit, Michigan, by depositing a copy thereof with the Clerk of the Recorder's Court for the City of Detroit, County of Wayne, State of Michigan.

Subscribed and sworn to before me this 28th day of December, A.D., 1954.

Notary Public, Wayne County, Michigan

My commission expires Nov. 11, 1957.

Appendix "C"

Michigan Court Rule 60, § 2, mapping procedure to obtain leave to appeal to Supreme Court.

Sec. 2. To obtain leave to appeal to the Supreme Court from a court of record, appellant shall within the time limited for taking an appeal as of right (except when delayed appeal is sought);

(a) Prepare an application for leave to appeal, setting forth the reasons and grounds of appeal, and attach to it a concise statement of the proceedings and facts as far as they are material. In all cases where error is alleged in the charge of the court, the whole of the charge shall be set up in the statement. It shall also contain the date of entry and a copy of the judgment, decree or order appealed from, and the opinion of the court, if one has been filed, or dictated to the court reporter.

The application shall further state whether general appeal or appeal in the nature of mandamus, certiorari, prohibition, et cetera, is sought.

In criminal cases the application shall also state (1) the sentence imposed, and (2) if defendant desires bail pending appeal, the amount of bail set by the trial court pending application for leave to appeal, if any was set.

(b) Serve copy of the application and concise statement on all other parties, whether joint or adverse, with notice of prompt settlement of the statement before the trial judge or any other judge having jurisdiction to settle a bill of exceptions in the case. See Rule 66, § 13.

(c) Objections to the concise statement shall be settled by the judge and, when satisfied, he shall certify that it fairly presents the questions for review.

A transcript of the testimony shall not be required as a basis for the settlement. The judge settling such statement may correct it or add matters of record which he may deem necessary to present the issue properly. When a discretionary action of the court is to be reviewed, the judge may add to the statement his reasons for such action. In case appellant shall object to corrections or additions made to the statement by the judge, he may further present, with his application, true copies of pleadings and exhibits and a transcript of the relevant testimony relating to the question for review.

(d) Promptly after the statement is settled and certified, appellant shall file the application and certified statement with the clerk of the Supreme Court and notice it for hearing as a motion.

(e) With service of notice of hearing, appellant shall serve on all other parties a typewritten or printed brief in support of such application and make proof of service thereof. Any party may file brief in opposition to the application.

Appendix "D"

Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure—"Examination of Offenders."

"Sec. 1. The state and accused shall be entitled to a prompt examination and determination by the examining

magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination." [Michigan Stat. Ann. (Henderson) § 28.919].

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him." [Michigan Stat. Ann. (Henderson) § 28.920].

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." [Michigan Stat. Ann. (Henderson) § 28.921].

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent." [Michigan Stat. Ann. (Henderson) § 28.922].

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial." [Michigan Stat. Ann. (Henderson) § 28.923].

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial." [Michigan Stat. Ann. (Henderson) § 28.931].

FILED
JUN 24
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE AND BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

REPLY BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 43

MORRISON T. WADE AND BESSIE LOU WADE, *Appellants*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

REPLY BRIEF OF APPELLANTS

This is a criminal case. It comes to the Court from a conviction on verdict of guilty by a jury on a charge of "gross cheats" (R. 299, 310). The proceeding was instituted by a one-judge grand juror, under the Michigan statute. This investigation lasted five months. It was a cause celebre, widely reported in the press (R. 9, 124-125, 155, 327, 328). Every one of the petit jurors subsequently empanelled for the trial had read about the judicial inquisition (R. 155). Convinced that this procedure violated their constitutional rights to "due process" under the Fourteenth Amendment to the Constitution and worked to their substantial prejudice at the trial, appellants sought review here. Their Statement of Jurisdiction concentrated on the

constitutionality of the Michigan one-judge grand jury system, a question which this Court has noted but failed to pass on in *In re Oliver*, 333 U. S. 257, and *In re Murchison*, 75 S. Ct. 623, — U. S. — (1955).

Appellee has moved this Court to dismiss the appeal.

1. The appellee contends that petitioners made a "mere technical error in procedure" by stating, on their Jurisdictional Statement, that "this is an appeal from a sentence of conviction in the Recorder's Court of the City of Detroit." But the very authorities cited by appellee, including *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 159-161, are quite clear that when the highest court of the state denies a discretionary appeal, as here, appeal to this Court is from the trial court.

2. The second ground for dismissal is that the questions presented are not sufficiently explicit. Our statement of issues is based on the language of this Court. The question here is the question left open in *In re Oliver*, 333 U. S. 257, 264:

> "The petitioner does not here challenge *the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge*, and therefore we do not concern ourselves with that question." (Emphasis supplied).

3. Finally, appellee contends that the question is not worthy of appeal. We contend that indictment by the Court destroys the presumption of innocence, and invades the independence of the judiciary, because of its inevitable impact on a later criminal trial. Appellee answers with the propositions that under the statute the final order of the grand-juror is technically an order to bind the defendants to appear for trial rather than an "indictment", and that this procedure does not result in a "commingling of the function of the investigative and adjudication functions" because it has been held to be purely "judicial" in *In re*

Slattery, 310 Mich. 458, 17 N. W. 2d 251, cert. den. 325 U. S. 876. Neither of these contentions reaches the heart of our argument that the procedure violates the Constitution. The name of the process issued by the judge is immaterial; the characterization of the function he performs is of no moment. Petitioners are convinced that the extensive grand jury investigation prejudiced their later trial. They were tried on an accusation by a member of the bench. The judge who interrogated the witnesses and drafted the charge was acting with all the authority of one who acts as a "judicial officer", as the *Slattery* case itself holds. Judicial accusation has its inevitable impact on both the trial court and the jury. We think it deprived petitioners of the fair trial they were entitled to.

This is an important issue. The Michigan system is unique. It is the only one, in the whole history of Anglo-Saxon jurisprudence, where the court itself after an extensive investigation institutes the criminal proceedings. We think that power is ripe for review. The Court has twice before considered, and severely limited, the contempt power of judge grand-jurors under the Michigan system. *In re Oliver, supra, In re Murchison, supra.* We think that the analysis of the system in those two cases support our contentions here. As the Court has recently said in *In re Murchison*, 75 S. Ct. at 625-626:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as

a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' *Tumey* v. *Ohio*, 273 U. S. 510, 532. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U. S. 11. . .

". . . A single 'judge-grand jury' is even more part of the accusatory process than an ordinary lay grand juror. Having been a part of that process *a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.* While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal." (Emphasis supplied).

The Court held that "As a *practical matter* it is *difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' session.*" (Emphasis supplied) Our position is similar: "in the very nature of things" it is not possible for a fellow judge, or a jury, to treat an accusation by the court with strict impartiality. The court having been made a "part of the accusatory process . . .", the possibility, and even the appearance, of a fair trial vanishes. See *Offutt* v. *United States*, 348 U. S. 11. In *Murchison* the judge-grand juror was barred from passing directly on contempt proceedings arising out of testimony before him in his role as an investigator. This was so because in the generality of cases most judges would be personally influenced against the defendant. By a parity of reasoning, the Michigan procedure which employs the Court to make the initial accusation denies due process to the defendant at the eventual trial. Judicial accusation has an inevitable effect on the judge and jury in the trial on the merits.

For the reasons stated, we think the appeal presents an important constitutional question within the jurisdiction of this Court.

Respectfully submitted,

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